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Nos. 82-963, 82-1711 and 82-1771

In the

Supreme Court of the United States

OCTOBER TERM, 1983

COMMONWEALTH OF MASSACHUSETTS, Petitioner,

vs.

OSBORNE SHEPPARD, Respondent.

STATE OF COLORADO, Petitioner,

vs.

FIDEL QUINTERO, Respondent.

UNITED STATES OF AMERICA, Petitioner,

vs.

ALBERTO ANTONIO LEON, et al., Respondents.

On Writs of Certiorari to the Supreme Judicial Court of Massachusetts, the Supreme Court of Colorado, and the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE ILLINOIS STATE BAR ASSOCIATION As AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether *Illinois* v. *Gates*, ... U.S. ..... (No. 81-430, 1983), has obviated the need to consider a "reasonable good faith mistake" exception to the Fourth Amendment exclusionary rule.

TABLE OF CONTENTS

PAGE

Interest of *Amicus Curiae* Illinois State Bar Association 1

Summary of Argument 2

Argument 5

I. CREATION OF A "REASONABLE GOOD FAITH MISTAKE" EXCEPTION TO THE FOURTH AMENDMENT EXCLUSIONARY RULE IS FORECLOSED BY THIS COURT'S RECENT DECISION IN ILLINOIS V. GATES .. 5

A. THERE CAN BE NO SUCH THING, UNDER *GATES*, AS AN OBJECTIVELY REASONABLE GOOD FAITH MISTAKE OF PROBABLE CAUSE 6

B. RESTRICTION OF THE EXCLUSIONARY RULE IN THE WAKE OF *GATES* WOULD CONFUSE AND WEAKEN THE MEANING OF PROBABLE CAUSE 8

C. *GATES* HAS OBVIATED THE NEED TO CONSIDER A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE IN WARRANT CASES 10

D. *GATES* HAS OBVIATED THE NEED TO CONSIDER A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE IN WARRANTLESS SEARCH CASES 10

II. WHERE A SEARCH IS UNDERTAKEN PURSUANT TO A WARRANT THE GOOD FAITH OF THE POLICE OFFICER IS IRRELEVANT AND THE EXISTENCE OF A "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE HAS NO APPLICATION 11

PAGE

III. EXCLUSION OF UNLAWFULLY SEIZED EVIDENCE REMAINS THE BEST AND MOST APPROPRIATE REMEDY WHERE THE SEIZURE TAKES PLACE PURSUANT TO A WARRANT ERRONEOUSLY ISSUED UPON SOMETHING LESS THAN THE CONSTITUTIONALLY MANDATED STANDARD OF PROBABLE CAUSE 13

IV. THE FEDERAL EXCLUSIONARY RULE EVEN IN ITS PRESENT FORM IS INAPPLICABLE TO MASSACHUSETTS V. SHEPPARD AND THIS UNIQUE CASE IS AN INAPPROPRIATE VEHICLE FOR RE-EXAMINATION OF THE RULE 18

Conclusion 20

TABLE OF AUTHORITIES

Aguilar v. *Texas*, 378 U.S. 108 (1964) 3, 5

Bivens v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) 18

Brinegar v. *United States*, 338 U.S. 160 (1949) 3, 6, 11, 14

Carroll v. *United States*, 267 U.S. 132 (1925) 14

Draper v. *United States*, 358 U.S. 307 (1959) 11

Elkins v. *United States*, 364 U.S. 206 (1960) 16

Franks v. *Delaware*, 438 U.S. 154 (1978) 11

Husty v. *United States*, 282 U.S. 694 (1931) 14

Illinois v. *Gates*, ... U.S. ....., 103 S.Ct. 2317 (No. 81-430, 1983) ..... *passim*

Mapp v. *Ohio*, 367 U.S. 643 (1962) 16, 18

PAGE

Spinelli v. *United States*, 393 U.S. 410 (1969) 3, 5
Stone v. *Powell*, 428 U.S. 465 (1976) 13-14, 18
United States v. *Calandra*, 414 U.S. 338 (1974) 13
United States v. *Janis*, 428 U.S. 433 (1976) 14
Weeks v. *United States*, 232 U.S. 383 (1914) 13, 16, 18
Wolf v. *Colorado*, 338 U.S. 25 (1949) 16
United States Constitution, Amendment IV 13
Illinois Revised Statutes, Ch. 38, Sec. 108-14 19
LaFave, *Search and Seizure*, 1978 17

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BRIEF OF THE ILLINOIS STATE BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE ILLINOIS STATE BAR ASSOCIATION

The Illinois State Bar Association is a state-wide voluntary professional association of attorneys of the

State of Illinois. Its membership consists of approximately 25,000 lawyers and judges, and includes the majority of Illinois attorneys. The Association has traditionally taken an active role in public education on legal issues and legal reform in the public interest. It maintains special section councils in areas of substantive law, including criminal justice.

The Association, through the section council on criminal justice, has frequently examined and debated the exclusionary rule. In December of 1981, the Board of Governors of the Association adopted a resolution supporting continuation of the present exclusionary rule and subsequently authorized filing of an *amicus curiae* brief in this Court supporting continuation of the rule in its present form.

During the Court's October, 1982 term, the Association filed a brief as *amicus curiae* in *Illinois* v. *Gates,* No. 81-430.

The Board of Governors has specifically authorized the preparation and filing of an *amicus curiae* brief in support of Respondents in the present cases.

SUMMARY OF ARGUMENT

The time for a "reasonable good faith mistake" exception to the exclusionary rule is over. The claimed benefits of the proposed exception cannot survice this Court's decision in *Illinois* v. *Gates,* ..... U.S. ....., 103 S.Ct. 2317 (No. 81-430, 1983). The proposal found its justification in the supposed futility of suppressing evidence where the searching officer believed, both subjectively and in objectively reasonable good faith, that his actions did not violate the Fourth Amendment.

The concept of an objectively reasonable good faith mistake is meaningless in light of *Gates,* which abandoned the technical analysis of *Aguilar* v. *Texas,* 378 U.S. 108 (1964) and *Spinelli* v. *United States,* 393 U.S. 410 (1969), in favor of the original "totality of circumstances" test of earlier cases such as *Brinegar* v. *United States,* 338 U.S. 160 (1949). In determining probable cause the courts look once again to "probabilities" and "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Law enforcement officers and magistrates look to "common-sense conclusions about behavior."

Probable cause exists, under *Gates,* where the "practical, common-sense" consideration of all the circumstances shows "a fair probability that contraband or evidence of a crime will be found in a particular place."

Under this simplified test for probable cause there is no room for a mistake which is made in good faith and yet is, at the same time, objectively reasonable.

Gates has incorporated objective reasonableness into the test of probable cause itself. To go further and hold that the remedy of exclusion should be unavailable to redress a search which fails to meet this test would entrust the Fourth Amendment to the discretion of the police.

Although the exclusionary rule is not made explicit by the Fourth Amendment, that Amendment does explicitly require probable cause as the precondition of a lawful search, and it unquestionably presupposes that its commandment will be obeyed. Obedience demands enforcement, which in turn demands a remedy.

The exclusionary rule is the only fair, practical and effective remedy for Fourth Amendment violations. It is directed toward the illegal evidence, not toward punishment of the erring officer.

The good faith belief of the searching officer is immaterial where the search is conducted pursuant to a warrant. Where the search is without a warrant, a good faith exception threatens the integrity of the probable cause standard.

Under exceptional circumstances, a mere clerical error or oversight in an otherwise valid warrant may not involve any Fourth Amendment violation and would not justify exclusion of evidence. Even in this situation, however, good-faith analysis is not helpful.

ARGUMENT

I.

CREATION OF A "REASONABLE GOOD FAITH MISTAKE" EXCEPTION TO THE FOURTH AMENDMENT EXCLUSIONARY RULE IS FORECLOSED BY THIS COURT'S RECENT DECISION IN ILLINOIS V. GATES.

The "reasonable good faith mistake" exception is an idea whose time is over. There is no place for the contemplated exception under the practical, common-sense standard of probable cause re-enunciated by this court in *Illinois* v. *Gates,* ..... U.S. ....., 103 S.Ct. 2317 (No. 81-430, 1983)

By rejecting the highly analytical system of probable cause determination which evolved after *Aguilar* v. *Texas,* 378 U.S. 108 (1964) and *Spinelli* v. *United States,* 393 U.S. 410 (1969) and incorporating objective reasonableness into the probable cause determination itself, *Gates* has made an objectively reasonable mistake a logical and practical impossibility. Freeing the magistrate, any by extension the officer acting without a warrant, to exercise discretion based upon the totality of the circumstances, *Gates* has also rendered the uncertainty inherent in a "good faith mistake" exception intolerable.

Whatever the justifications for the exception may have been in the past, they cannot survive *Gates.* Whatever the excessive costs of the exclusionary rule may have been in the past, *Gates* has cured them. A double cure, combining the restated probable cause standard with virtual elimination of the remedy for violation, is far

more dangerous than any defects of the exclusionary rule. The complaints asserted by petitioners have been remedied by *Gates*.

A.

THERE CAN BE NO SUCH THING, UNDER GATES, AS AN OBJECTIVELY REASONABLE GOOD FAITH MISTAKE OF PROBABLE CAUSE.

Gates reemphasized what had often been forgotten in Fourth Amendment analysis; namely, that the probable cause standard itself incorporates the concept of objective reasonableness. Quoting from *Brinegar* v. *United States*, 338 U.S. 160 (1949), *Gates* reminds us that,

> "In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar* at 175, quoted in *Gates*, 103 S.Ct. at 2328.

This lesson runs throughout the *Gates* decision. "[P]robable cause is a fluid concept — turning on the assessment of probabilities in particular factual contexts — not readily, or even usefully, reduced to a set of legal rules." 103 S.Ct. at 2328. Veracity, reliability and basis of knowledge are "better understood as relevant considerations in the totality of circumstances analysis that traditionally has guided probable cause determinations." 103 S.Ct. at 2329.

Putting aside multiple-prong and convoluted tests, designed to guide the magistrate's discretion but in the end becoming an overgrown impediment to it, the Court once

again looks to the heart of the determination, concluding that where there exists a "substantial basis for . . . conclud[ing] that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more." 103 S.Ct. at 2331.

In a summary of its ruling, *Gates* states,

> ". . . [W]e conclude that it is wiser to abandon the 'two-pronged test' established by our decisions in *Aguilar* and *Spinelli*. In its place we reaffirm the totality of the circumstances analysis that traditionally has informed probable cause determinations. [citations omitted] The task of the magistrate is simply to make a practical common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." 103 S.Ct. at 2332.

Lest this deference to the practical discretion of the magistrate be misconstrued as a reduction in the actual standard of probable cause, *Gates* warned that "[i]n order to ensure that . . . an abdication of the magistrate's duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued." 103 S.Ct. at 2332.

Although a bare-bones conclusory affidavit is obviously inadequate, merely going beyond this is not necessarily sufficient. The capsule rule of *Gates* is that when an affidavit offering more than mere conclusions is tested, the same level of probable cause as before is to be sought by a "flexible, common-sense" standard, rather than by means of rigidly prescribed rules. 103 S.Ct. at 2333.

With its emphasis on the flexible, the common-sense, the practical, and its explicit reaffirmation of the "reason-

able and prudent man" standard of *Brinegar*, *Gates* has incorporated the concept of "objective reasonableness" into the determination of probable cause itself. It is difficult to see how probable cause could ever be found under *Gates* if the totality of the circumstances did not lead to an objectively reasonable belief adequate to overcome the suspect's Fourth Amendment rights. And an absence of practical, common-sense, probable cause would render an objectively reasonable good faith mistake a contradiction in terms. Subjective good faith mistake there well might be, but no responsible advocate of the good faith exception has had the temerity to suggest that this should be adequate to avoid suppression. Cf. *Illinois* v. *Gates*, concurring opinion of Justice White.

B.

RESTRICTION OF THE EXCLUSIONARY RULE IN THE WAKE OF GATES WOULD CONFUSE AND WEAKEN THE MEANING OF PROBABLE CAUSE.

Nothing in *Gates* was intended to dilute or diminish the meaning of probable cause. Part III of the Court's opinion leaves no doubt that, although the method for determining that standard has been simplified and clarified, the actual standard has in no way been reduced.

Nevertheless, just as certain language in *Aguilar* and *Spinelli* has been misread into a test of untenable rigidity, the emphasis in *Gates* on flexible, practical common-sense poses the danger of unduly lax construction. The concurring opinion of Justice White foresees precisely this danger and warns, ". . . as I read the majority opinion, it appears that the question whether the probable cause standard is to be diluted is left to the common-sense judgments of issuing magistrates." 103 S.Ct. at

2350; Justice White, concurring. The dissenting opinion of Justice Brennan expresses concern that "words such as 'practical,' 'non-technical,' and 'common-sense,' as used in the Court's opinion, are but code words for an overly permissive attitude towards police practices in derogation of the rights secured by the Fourth Amendment," 103 S.Ct. at 2359; Justice Brennan, dissenting. Although the opinion of the Court makes it clear that no such derogation is intended, 103 S.Ct. at 2333-2334, the fact remains that *Gates*, like its predecessors, is subject to misconstruction and overly permissive interpretation by lower courts, magistrates and police agencies.

Yet with *Gates* hardly six months old, this Court is once again invited to engraft a large, vague and illogical exception onto the exclusionary rule.

The case for restricting the exclusionary rule is stated in Justice White's concurrence in *Gates*. But Justice White proposed modification of the rule as an alternative to abandonment of *Aguilar* and *Spinelli*. The Court chose instead to restrict *Aguilar* and *Spinelli*, and left the exclusionary rule intact.

Petitioners continue, however, to press for a good faith exception as though *Gates* had never been decided. Thus, although the brief of the United States is replete with citations to the concurring opinion in *Gates*, it pays scant heed to the opinion of the Court, and it never comes to grips with the fact that *Gates* has radically altered the context in which the future of the exclusionary rule must be judged.

C.

GATES HAS OBVIATED THE NEED TO CONSIDER A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE IN WARRANT CASES.

Under *Gates*, the totality of the circumstances must be viewed as "the factual and practical considerations of everyday life on which reasonable and prudent men . . . act." 103 S.Ct. at 2328. If this test, which includes the concept of objective reasonableness at its very heart, is not met, then no amount of good faith on the part of the police officer can make the search reasonable or constitutional.

Even before the *Gates* decision, the application of a "good faith mistake" test to the warrant situation was fraught with dangers and difficulties. (see Argument *II., infra.*) In light of that decision it is pointless. Objective reasonableness is part of probable cause. A search without probable cause can never be objectively reasonable.

D.

GATES HAS OBVIATED THE NEED TO CONSIDER A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE IN WARRANTLESS SEARCH CASES.

Even though *Gates* was decided in the context of a search based upon a warrant, it obviates the need to consider a good faith exception in warrantless search cases as well. Whether a search is conducted with a warrant or without, probable cause remains probable cause. The practical, common-sense standard employed by the magistrate in passing on a warrant application must, of necessity, be employed by a judge reviewing the discretion of an officer acting under an exception to the warrant requirement.

And if under the totality of circumstances test in a warrantless search the searching officer fails to meet the standard of a reasonable and prudent man, *Brinegar* v. *United States,* 338 U.S. 160, 171 (1949), *Draper* v. *United States,* 358 U.S. 307 (1959), *Illinois* v. *Gates,* ..... U.S. ....., 103 S.Ct. 2317 (1983), though he may have had good faith, that good faith cannot be reasonable.

II.

WHERE A SEARCH IS UNDERTAKEN PURSUANT TO A WARRANT THE GOOD FAITH OF THE POLICE OFFICER IS IRRELEVANT AND THE EXISTENCE OF A "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE HAS NO APPLICATION.

Even before *Gates,* the good faith mistake exception made no sense in a warrant case. The subjective good faith or bad faith of a police officer is irrelevant where a search and seizure is conducted pursuant to a warrant. Although a perjured affidavit may render invalid a warrant which bears no defect on its face, *Franks* v. *Delaware,* 438 U.S. 154 (1978), the opinion of the officer as to whether the magistrate was right or wrong in issuing the warrant has no other bearing on the application of the exclusionary rule.

Where a warrant has been sought and actually has issued the officer's opinion as to the reasonableness of the search or of the warrant is of no importance. There is no reason, in law, logic or policy to countenance a rule which places on the police officer the obligation or duty to second guess the magistrate or sit in his squad car as a court of review over Fourth Amendment determinations.

The true issue in a warrant case has nothing to do with good faith or reasonable mistakes on the part of the police. It is instead whether, regardless of the subjective beliefs of the police officer, evidence seized pursuant to a warrant issuing on inadequate facts is to be immune from exclusion.

If the warrant is valid it is of no consequence that the officer believes the judge wrong. And if the warrant is invalid it is of no matter that the officer assumes, as he naturally would, that the judge was correct. The officer's duty is to assemble such evidence as is available in support of the proposed search, reduce it to the form of an affidavit, and submit it to a magistrate for decision as to whether or not the constitutional standard has been met. Once the affidavit has been submitted the officer's Fourth Amendment duty has been fulfilled, and the officer has no choice but to accept the magistrate's ruling and search or not search as the decision may be.

Once the warrant has issued the inquiry must go not to the beliefs of the officer but rather to the correctness or error of the magistrate. If probable cause has been shown then the Fourth Amendment rights of the subject of the search have been protected. If, on the other hand, the magistrate has signed a warrant without probable cause then the subject has suffered an infringement of rights for which a remedy must be available. It is a most peculiar notion that vindication of those rights should be barred because the officer on his way to execute the warrant is unaware that it is defective. The error and the infringement has been made by the court and it makes no sense to create a level of artificial insulation between the court and its error by creating a rule that if the ministerial officer who serves and exe-

cutes a bad warrant upon order of court believes it valid then the remedy which would otherwise follow is to be denied.

The continued general application of the exclusionary rule as the remedy for illegal searches and seizures based upon judicial warrants depends upon whether the rule is a necessary and constitutionally mandated corollary to the Fourth Amendment or whether, if not, it is nevertheless the most practical and reasonable remedy for violation of Fourth Amendment rights. The application in any individual case cannot, and should not, depend upon the subjective opinions of the police officer who obtains or executes the warrant as to whether it is valid or reasonable.

III.

EXCLUSION OF UNLAWFULLY SEIZED EVIDENCE REMAINS THE BEST AND MOST APPROPRIATE REMEDY WHERE THE SEIZURE TAKES PLACE PURSUANT TO A WARRANT ERRONEOUSLY ISSUED UPON SOMETHING LESS THAN THE CONSTITUTIONALLY MANDATED STANDARD OF PROBABLE CAUSE.

The probable cause standard for searches and seizures is the explicit mandate of the Constitution. The Fourth Amendment plainly states that ". . . no Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . ." U.S. Constitution, Amdt. IV. Whether the exclusionary rule is similarly mandated is less clear. Early cases, including the seminal *Weeks* v. *United States*, 232 U.S. 383 (1914), view exclusion of illegally seized evidence as flowing inevitably from the Fourth Amendment, while such later cases as *United States* v. *Calandra*, 414 U.S. 338 (1974) and *Stone* v. *Powell*, 428

U.S. 465 (1976) have construed the rule as a judicial remedy not necessarily required by the Constitution.

However that may be, it cannot be denied that probable cause as the basis of every warrant is no mere judicial construction but is as clear a command as any to be found in the entire Constitution. And the Fourth Amendment requirement that searches and seizures shall not be "unreasonable" has been consistently held to mean that the same standard of probable cause must be met whether the search and seizure is conducted with a warrant or without; compare *Carroll* v. *United States*, 267 U.S. 132 (1925)("reasonable grounds") with *Husty* v. *United States*, 282 U.S. 694 (1931)("probable cause") and *Brinegar* v. *United States*, 338 U.S. 160 (1949).

We need not disagree with cases holding that exclusion is not applicable to proceedings before a grand jury, *Calandra*, or to collateral review, *Stone*, or to a civil action, *United States* v. *Janis*, 428 U.S. 433 (1976), to conclude that they are not good guidance for criminal cases in which the government seeks to admit unlawfully seized evidence into the very prosecution for which the seizure was undertaken. It may be true that in the *Calandra*, *Stone* and *Janis* situations the benefits of exclusion are so slight and attenuated that the rule's effect on the evidence becomes the more important consideration.

This is not so where the fruits of an unlawful search are offered in the initial criminal prosecution. It is in that context that the warrant is actually sought and the existence or nonexistence of probable cause determined. To admit or refuse evidence in other types of proceed-

ings will have little effect on the fate of the probable cause standard. But to allow the results of Fourth Amendment violations into the initial criminal prosecution will have an immediate and deleterious effect on the very concept of probable cause and on the ability of the courts to enforce the protection of the Fourth Amendment.

The exclusionary rule has the merit of providing a remedy for any unlawful search and seizure, not merely for one which is intentional or extreme. If probable cause is to have any meaning it must be protected from well intentioned misapplication as well as from deliberate flouting. A substitute rule which would provide, as most suggested substitutes have, for some form of damages or discipline against the searching officer is both cruelly inappropriate and socially dangerous when applied in the case of accidental error. It has been objected that the exclusionary rule does not deserve to be applied to a good faith error. Yet it is far more unfair to impose damages or punishment upon the individual officer guilty of a well-motivated mistake.

The most dangerous feature of a rule imposing sanctions on the officer is that it will intimidate the police from performance of their duties. Under the present rule, the officer is not afraid to act in a doubtful case, knowing that if he errs the remedy will be directed where it belongs—against the improperly obtained evidence and not against him. Under virtually every other proposal the remedy is directed against the officer, with the result that either no remedy at all will exist for an honestly meant violation of a basic right, or else that because a remedy is available the police will be reluctant to leave their squad cars.

The exclusionary rule remains superior to any alternative, and the decision of almost every state to stay with the rule when it was not required remains persuasive evidence of this superiority.

The exclusionary rule for search and seizure cases has been the law in the federal courts since 1914, *Weeks* v. *United States,* 232 U.S. 383 (1914), but it did not become binding upon the states until forty-eight years later, *Mapp* v. *Ohio,* 367 U.S. 643 (1962). Throughout the intervening period the states were free to devise any other means they might choose to enforce constitutional privacy protections. Indeed, between 1949 and 1962 it was the explicit rule established by this court that although the Fourth Amendment was applicable to the states through the Fourteenth Amendment, the exclusionary rule was not. *Wolf* v. *Colorado,* 338 U.S. 25 (1949).

The absence of response to *Weeks* and *Wolf* suggests that there is no satisfactory substitute and that the exclusionary rule, whatever its shortcomings may be, remains preferable to any alternative, cf. *Elkins* v. *United States,* 364 U.S. 206 (1960).

Opponents of the exclusionary rule point to the social cost of not using presumably reliable evidence only because it has been improperly obtained. There is, to be sure, an unascertainable cost in making such evidence unavailable. It is not the exclusionary rule, however, which imposes that cost. It is the requirement that a search not take place in the absence of probable cause. Those who deplore the cost have a quarrel not with the procedural rule of exclusion, but with the substantive rule of the Fourth Amendment. Their remedy is not

to overrule *Weeks* or *Mapp* but to remove the requirement of probable cause from the Constitution.

Accusations against the exclusionary rule based upon its supposed cost are revealed as fallacious in an excerpt from a recent and highly respected treatise, La Fave on *Search and Seizure,*

> "The nature of the exclusionary rule is such that it makes the cost of honoring the Fourth Amendment apparent. As Professor Kaplan has observed, 'by definition it operates only after incriminating evidence has already been obtained' and thus 'flaunts before us the cost we must pay for the fourth amendment guarantees.' But it is not correct that the cost is attributable to the exclusionary rule. Those who drafted the Fourth Amendment may not have specifically contemplated the exclusionary sanction, but surely they expected the commands of the Amendment to be adhered to. 'To the extent that the police obey the constitutional commands, the community foregoes such advantages as it might enjoy from evidence that can only be obtained illegally.' It may fairly be said, then, as Justice Traynor once observed, that the cost argument was rejected when the Fourth Amendment was adopted." La Fave, *Search and Seizure,* Vol. 1, p. 23, (1978).

Nowhere is the absence of an alternative to the exclusionary rule so apparent as in the final pages of the Government's brief. (Brief of the United States, at 86-88) The plain fact is that we maintain the exclusionary rule because every alternative proposed to date is worse.

There may be alternative remedies for willful violations. The offending officer could be reprimanded, suspended, demoted, dismissed, fined or, in the most outrageous cases,

prosecuted and imprisoned. And where the subject of the search turns out to be innocent the civil tort remedy may have occasional practical value. But where, as is more often the case, the violation is a blunder, however severe, no other realistic remedy exists.

The government falls back on the assertion that existence of the exclusionary rule has discouraged the evolution of other remedies, a claim which is factually untrue and logically upside-down.

No issue of criminal procedure has received more attention and argument than the exclusionary rule. The challenge to find something better has been before the legal community since 1914, *Weeks* v. *United States*, 232 U.S. 383, and has been looking fifty state legislatures squarely in the eye since 1962, *Mapp* v. *Ohio*, 367 U.S. 643. For years members of this Court have indicated less than complete happiness with the rule, see e.g. *Stone* v. *Powell*, 428 U.S. 465 (1976), *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, (1971), Burger, C.J., dissenting. No good answer has been given. During oral argument in *Gates* the Solicitor General was unable to suggest an alternative in response to a direct invitation from Justice Marshall.

IV.

THE FEDERAL EXCLUSIONARY RULE EVEN IN ITS PRESENT FORM IS INAPPLICABLE TO MASSACHUSETTS V. SHEPPARD AND THIS UNIQUE CASE IS AN INAPPROPRIATE VEHICLE FOR RE-EXAMINATION OF THE RULE.

The exclusionary rule is a remedy for violations of the Fourth Amendment. Where no Fourth Amendment

violation has occurred the federal exclusionary rule, even its present form, does not apply. The Supreme Judicial Court of Massachusetts was in error in invoking the rule as a matter of federal constitutional law in the *Sheppard* case, 82-963. Because invocation was unnecessary even under present law, *Sheppard* is an improper vehicle for re-examination of that rule.

In *Sheppard* a warrant application was presented which fully satisfied the requirements of both probable cause and specificity. A magistrate reviewed and approved the application, and his determination that all constitutional requirements were properly met is not disputed.

Due to an exceptional clerical oversight, the face of the warrant failed to reflect the specificity which the magistrate had in fact reviewed and found. The searching officers, however, relied on their information as contained in the application rather than on the interlineated warrant form. The person searched did not rely on the specificity language of the warrant form.

There is no Fourth Amendment violation on these facts. Where both probable cause and specificity have been fully demonstrated to the magistrate, a mere clerical oversight on the face of the warrant, noticed by no one and relied upon by no one, has transgressed no constitutional right. Exclusion of evidence may have been required by Massachusetts law. It was not required by the Fourth Amendment.

Amicus respectfully calls the Court's attention to a statute from its own state which is the appropriate method of handling such a case. Ill.Rev.Stat., Ch. 38, § 108-14, provides:

> No warrant shall be quashed nor evidence suppressed because of technical irregularities not affecting the substantial rights of the accused.

The good faith beliefs of the officers, reasonable or not, are immaterial on these facts because the search was not unconstitutional. It would be a mistake for this Court to misuse a valid search mildly tainted by nonprejudicial clerical error as a vehicle for re-examining so important a doctrine as the exclusionary rule.

CONCLUSION

The exclusionary rule should not be modified, and the proposed "reasonable good faith mistake" exception should be firmly rejected.

Amicus respectfully suggests that *Massachusetts* v. *Sheppard* does not involve any Fourth Amendment violation; that invocation of the exclusionary rule by the Supreme Judicial Court of Massachusetts was not required by federal constitutional law; and that application of "reasonable good faith mistake" analysis to this case is highly inappropriate and would constitute an advisory opinion.

Amicus believes that consideration of the searching officer's belief as to the validity of a regularly issued warrant is not proper and that "reasonable good faith mistake" analysis has no place in review of a search pursuant to a warrant.

Amicus also respectfully submits that *Gates* v. *Illinois* has obviated any need to consider a "reasonable good faith mistake" exception. Whatever the case may have been before, *Gates* has made modification of the exclusionary rule unnecessary, unwise and illogical.

Respectfully submitted,

THE ILLINOIS STATE BAR ASSOCIATION, *Amicus Curiae,*

By: .....
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